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Supreme Court of the United States

October Term, 1954

No. 28

EVELYN RICE,

Petitioner,

vs.

SIOUX CITY MEMORIAL PARK CEMETERY, INCORPORATED, A Corporation; F. K. LYTLE, and J. M. GUNNELL

Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

OPINION DELIVERED IN COURTS BELOW

The statement in Petitioner's Brief under this heading is correct, except that the opinion of the Supreme Court of Iowa reported in 60 N. W. 2d 110 is the only decision herein involved. The decision in the United States District Court for the Northern District of Iowa, Western Division, reported in 102 Fed. Supp. 658 is in no way involved.

STATEMENT OF GROUNDS

Statement contained in Petitioner's Brief under this heading is correct.

CONSTITUTION AND TREATY PROVISIONS INVOLVED

Statement contained in Petitioner's Brief under this heading is correct.

———o———

QUESTIONS PRESENTED FOP REVIEW

Statement contained in Petitioner's Brief under this heading is correct, except that we would restate the question in slightly different form as follows:

> The review presents the single question whether the decisions of the Courts of Iowa, the Trial Court and the Supreme Court, constituted "state action" in contravention of the Fourteenth Amendment to the United States Constitution; any provision of the United Nations Charter; or, any applicable Federal Public Policy.

———o———

STATEMENT OF THE CASE

Petitioner's statement of the case is accurate with the following modifications:

The contract in question was not strictly one for the purchase of cemetery lots, but was one for

> "Right of sepulture * * * for burial purposes only * * * and burial privileges accrue only to members of the Caucasian Race." (R. 10.)

There is nothing in Petitioner's Petition filed in the court below claiming any fraud or asking reformation of the contract. (See Petition R. 2-9.)

The case was not tried on the merits, but was heard on appeal in the Supreme Court of Iowa upon the ruling of the Trial Court, upon points of law, and particularly the Trial Court's ruling:

(a) That while the burial contract between the parties is unenforceable by Court action because of the racial restriction, it is "not void"; (R. 22)

(b) That no "state action" contrary to the Fourteenth Amendment or the United Nations Charter is involved, in permitting defendant to defend against an action for damages. (R. 22-24.)

———o———

SUMMARY OF ARGUMENT

Respondent's argument is presented under three (3) heads:

1. No "state action" is involved contrary to the Fourteenth Amendment (either the "due process" or the "equal protection" clauses) by the ruling of the Iowa Court.

2. The United Nations Charter does not prevent "racial discrimination" by private citizens of States.

3. There is no Federal Public Policy forbidding "racial discrimination" by private citizens of States.

———o———

ARGUMENT

1.

No State Action Is Involved

Petitioner in her argument has separately presented the "due process" clause, and the "equal protection" clause of the Fourteenth Amendment, although conceding that there appears to be no authority directly in point to the effect that racial discrimination by private citizens of a State has ever been held to violate "due process." Even in the case of *Hurd v. Hodge* (334 U. S. 24; 68 S. Ct. 847; 92 L. Ed. 1187), which involved not citizens of a State, but citizens of the District of Columbia, this Court found it unnecessary to rule upon that constitutional issue. The HURD case was decided upon the Civil Rights Act of 1886 (8 U. S. C. A., §§ 41-42, 2 F. C. A., Title 8, §§ 41, 42), which was held to be unconstitutional as applied to citizens of States in the CIVIL RIGHTS CASES (1883, 109 U. S. 3; 3 S. Ct. 18; 27 L. Ed. 835), but was held to be applicable to citizens of the District of Columbia by the HURD decision.

In any event the Fourteenth Amendment forbids denial of *due process* or *equal protection* by the *State* and not by private individuals. The Fourteenth Amendment is, of course, not applicable to the District of Columbia, although the Fifth Amendment is. (*Hurd v. Hodge*, supra.)

That racial discrimination by citizens of states, either private or corporate, is not violative of the equal protection clause, has been too often held to merit argument. In the series of cases: *Shelley v. Kraemer*, *McGee v. Sipes* (1948, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1187,

3 A. L. R. 2d 441), etc., this Court made it perfectly clear that the only question open for decision was whether *enforcement* of a racial discrimination by *any official* action violated any rights of the citizen. Those cases held that a *judicial injunction* constituted such state action. In the later decision of *Barrows v. Jackson* (1953, 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586), this Court answered the question left open in the *Shelley* case and held that the *granting of judgment for damages* against one who breached a racial covenant constituted effective enforcement of a racial discrimination and was, therefore, state action contrary to the Fourteenth Amendment.

But, in the *Shelley* case, this Court made it abundantly clear that merely private action violated no guarantees against racial discrimination.

> "Since the decision of this Court in the civil rights cases, 109 U. S. 3; 27 L. Ed. 835, 3 S. Ct. 18 (1883), the principle has been firmly imbedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (*Shelley v. Kraemer*, supra.)

Respondent's case here rest upon the ingenious but unsound argument that failure to punish one who enters into an agreement containing a racial restriction *encourages* such discrimination. Such "failure to punish" (so the argument goes) is action by the State.

As pointed out by the Supreme Court of Iowa in the decision here under review, the Iowa Civil Rights Acts (Chapter 735 Code of Iowa 1950) forbids racial discrim-

ination by individuals as to certain activities; but until after the trial of this case, Iowa "had not seen fit to declare such private cemeteries within the civil right laws of this State." (R. 38.) The Iowa Supreme Court points out, however, that following the decision by the Trial Court in this case, the Iowa Legislature did (Chapter 84—55th G. A., § 1, § 8, 1953) expand the Civil Right Law "to cover just such incidents as arose in this case." The Iowa Court states further:

> " * * * but it is also worthy of note that by exceptions this legislation did not abridge desirable individual rights of restriction in church and fraternal private burial places. *Such proper discretion could not occur under plaintiff's urged expansion of constitutional construction.*" (Emphasis added, R. 37-38.)

If Petitioner's theory is valid, there could be no such thing as a burial place restricted to religious and racial groups. Although Petitioner admits (Brief p. 14, n. 1) that under the doctrine of *Dorsey v. Stuyvesant Town Corporation* (299 N. Y. 512, 87 N. E. 2d 541, 14 A. L. R. 2d 133, Cert. Den. 399 U. S. 981, 70 S. Ct 1019, 94 L. Ed. 1385), a private concern cannot be held liable in any manner for *refusing* to deal, or to enter into a contract for racial or other reasons. Petitioner nevertheless contends that if such private concern *does* enter into a contract *limited* to certain purposes, it should be made to respond in damages for refusal to perform a different contract *unlimited* as to such purposes.

Petitioner overlooks the fact that her contract was that she would bury only a Caucasian. The Respondent was not interested in whom she married. Neither are the Courts.

Suppose the Petitioner had been an Indian, but her husband had been a Caucasian. In such event if she had offered his body for burial, there is no question the Respondent would have had to bury her husband or respond in damages. It is, therefore, clear that the complaint of Petitioner that she has been discriminated against because of her marriage is obviously unfair and untrue. She has failed in the District and Supreme Court of Iowa not because of her *marriage* but because of her *contract*, voluntarily made. Petitioner offered for burial a non-Caucasian, and seeks damages of $180,000.00 on account of Respondent's refusal to perform a wholly different contract.

Petitioner states (Petitioner's Brief, p. 14):

> "Petitioner's case will not result in the disappearance of cemeteries intended only for members of a particular religious belief or of other private cemeteries devoted to particular groups of people * * * neither is Petitioner suggesting that the cemetery was compelled to sell a lot to her as was the situation in *Dorsey v. Stuyvesant Town Corporation* * * * "

Despite Petitioner's disclaimer, this is exactly what she is contending. Suppose a private cemetery "intended only for the members of a particular religious belief, or other private cemeteries devoted to particular groups of people," contracts for the burial of the body of a Catholic or Jewish communicant in good standing, and the other party to the contract offers for burial one not so qualified; according to Petitioner's contention in this case, the refusal of a Court to grant damages against the cemetery for refusal of burial contrary to the terms

of such contract would constitute "state action" in violation of the Fourteenth Amendment, the United Nations Charter, etc.

It is an obvious contradiction in terms if a private person or corporation has the *undoubted right* to refuse to contract with a person for religious, racial, or any other reason, and has the right to deal, if at all, only with persons of a particular race or religion, but can be punished for so doing or for so limiting his or its contracts. We are thus forced into the absurd position of saying, "You have a perfect right to do the act but you will be punished or be liable for damages if you do it."

Petitioner admits (Brief, p. 14) that Respondent has an undoubted right to refuse to deal with Petitioner at all, for any reason or no reason, but contends that if the parties did enter into a contract of a particular kind, damages should be awarded for not carrying out an entirely different contract. The right not to sell or to deal at all would appear to carry with it the right to deal only on the seller's terms, so long as such terms are neither illegal nor void as a matter of law.

In connection with the *Dorsey v. Stuyvesant Town Corporation*, supra, case, it is recalled that this Court denied Certiorari (339 U. S. 982; 94 L. Ed. 1385). Mr. Justice Jackson was of the opinion that certiorari should be granted. An interesting history of the Stuyvesant Town Corporation property that was involved appears in an article in the August 1954 American Bar Association Journal, Volume 40, No. 8, at p. 679. The negroes who had been denied the right to become tenants of the property on racial grounds by the highest Court in the State

of New York (*Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512; 87 N. E. 2d 541; 14 A. L. R. 2d 133) managed to get into the possession of one of the apartments "as guests or sub-tenants in violation of clear lease provisions making such occupancy by anyone a lease violation." The building owner brought action for eviction, *Stuyvesant Town Corp. v. Berg*, (126 N. Y. L. J. 1008). The author of the A. B. A. Journal article states:

> "The position of the owner was sustained at all stages of the litigation, including, finally, denial in one of the cases of a stay by one of the justices of the United States Supreme Court."

Upon inquiry to the Clerk of this Court, we are advised that Mr. Justice Jackson on December 5, 1951, signed the order denying a stay, although this action is not officially reported. Apparently the contention of the negroes in question was very similar to that of Petitioner in the instant case, to wit, that by not punishing Respondent, the Iowa Court was assisting in enforcing a restrictive covenant. Petitioner states:

> "Respondent cemetery in this case is attempting to protect itself by using the restrictive covenant as a shield in this damage action. The Iowa Court by its ruling has made it possible for a cemetery to use the covenant as a defense. The Iowa Court has, therefore, by its ruling given vitality to the restrictive covenant and is punishing Petitioner for her failure to abide by it." (Petitioner's Brief, pp. 13, 14.)

Indeed, these persons seeking admission as tenants of the *Stuyvesant Town Corporation* property were in a much stronger position than Petitioner in our case because they were able to say that the Courts of the State of New York were being called upon to *evict* negroes from a prop-

erty to which they were denied access on racial grounds. Nevertheless, they were unsuccessful and Mr. Justice Jackson denied a stay of proceedings pending final determination. Of course, it may be said, and probably was claimed by the property owners that it was seeking to evict the negroes because they had gained possession of the apartment wrongfully, and not solely on the ground that they were negroes. The result was the same, however, and it could as well be said in that case as Petitioner says in the case at bar that the property owner was being allowed by the State Courts to use the racial covenant "as a shield."

Petitioner quotes from and relies largely upon the case of *Gandolfo v. Hart* (Ct. C. Calif. 1892), 49 Fed. 181, in support of her contention that the decision of the Supreme Court of Iowa violated the equal protection clause of the Fourteenth Amendment. As throughout Petitioner's argument, she persistently refuses to recognize the difference between *state action,* which is forbidden by the Amendment, and private action, which by an unbroken line of decisions is not.

The *Gandolfo* case was a bill in equity asking injunction against the owner of real estate to prevent him from leasing it to certain Chinese residents, contrary to the provisions of a restrictive covenant in the title. The defendant challenged the bill by demurrer, which was sustained. The right of the court to enforce a restrictive covenant by injunction was challenged as a violation of the treaty between the United States and China of November 17, 1880, which guaranteed to certain Chinese residents: "all the rights, privileges, immunities and exemptions which are accorded the citizens and subjects of the

most favored nation." The Court held that under the terms of this Treaty and the "equal protection of the laws" provision of the Fourteenth Amendment, the restrictive covenant "should not be enforced in any court—certainly not in a court of equity of the United States."

There is nothing in the *Gandolfo* decision to support in the slightest Petitioner's contention that she has the right to claim a judgment for damages against Respondent on the ground that Respondent refused to permit her to enforce a contract directly contrary to the provisions of such contract, voluntarily entered into.

No one, and certainly not the Respondent, is asking any Court to "enforce" the racial restriction herein involved. Respondent entered into a contract freely and voluntarily with Petitioner, as it had an unquestioned right to do. Petitioner now says:

> "True, you had the right to make this contract, but unless the Court will punish you for doing so, you are being permitted to use the racial restriction as a 'shield'."

Petitioner seeks to support her contention that the Iowa Supreme Court has "violated the equal protection clause of the Fourteenth Amendment" by citing the case of *Clifton v. Punte* (Tex. Civ. App. 1948), 218 S. W. 2d 272 (Petitioner's Brief, p. 15).

Petitioner states (n. 2, p. 15 Brief): "The Texas Civil Appeals Court, in refusing to grant judicial sanction to a restrictive covenant * * * reasoned that as a result of the litigation it was no longer a question of the voluntary choice of the parties to abide by the covenant but had now become the choice of the State of Texas." No

such conclusion can possibly be reached from the decision in that case. Plaintiff-Appellant, CLIFTON, brought an action seeking to enforce forfeiture of title against the defendant by reason of a violation of a racial restriction contained in a deed in the chain of title. The Lower Court entered judgment in favor of defendant and the Court of Civil Appeals affirmed, upon the authority of *Shelley v. Kraemer* and *McGee v. Sipes*, supra. Nothing appears in the case to support Petitioner's contention that the contract ceases to be "voluntary" when one of the parties goes into court. In the *Clifton* case the Court said (at p. 274):

> "Without affirmative enforcement of the racial covenant involved, it would seem that the scheme of restriction applicable to the subdivision of which the property involved here is a part, cannot be effectively realized, should voluntary methods fail."

In other words, all that the Texas Court said in the *Clifton* case, and the only proposition for which that case can be an authority, is that "affirmative enforcement" of a racial covenant by the judicial arm of the State is foreclosed by the holding of the United States Supreme Court in the *Shelley v. Kraemer* and *McGee v. Sipes* cases.

2.

The United Nations Charter Does Not Prevent Racial Discrimination by Private Citizens of States.

Respondent concedes the correctness of the contention of Petitioner that the United Nations Charter is a Treaty and as such is the "Supreme Law of the Land" and that "Judges in every State shall be bound thereby."

The question here, however, is whether anything in this Treaty prohibits private citizens of the States from racial and religious discrimination against each other.

This Court is aware that amici curiae briefs on behalf of the American Association for the United Nations were filed in the *Shelley, McGee* and *Hurd* cases (3 A. L. R. 2d 441; 334 U. S. 28, n. 4).

In the *Sipes v. McGee* case in the Michigan Court (316 Mich. 614; 25 N. W. 2d 638, 644) the same contention regarding the United Nations Treaty was made. The Michigan Court was quoted with approval by the Iowa Supreme Court (R. 39). The United States Supreme Court reviewed the *McGee* case and reversed on constitutional grounds, but offered no criticism on the ruling with reference to the applicability of the Treaty. The California Court gave the Treaty the same interpretation. (*Fujii v. California,* 217 Pac. 2d 481, 218 Pac. 2d 595, Reversed on this point in 242 Pac. 2d 617, 622, 38 Cal. 2d 718.) The decision in the *Fujii* case in the lower California Court had appeared to hold that the Charter of the United Nations had the effect of superseding the California Alien Land Law. It will be recalled that proponents of the Bricker Amendment contended that this Treaty had been held by the lower California Court to have the effect of private law and was binding upon individual citizens in their relations with each other. The California Supreme Court, however (242 Pac. 2d 617, at 622 Calif. 2d 718) said:

> "We are satisfied, however, that the Charter provisions relied upon by plaintiff were not intended to supersede existing domestic legislation * * *."

In the instant case, the Iowa Court correctly held:

> "* * * the provisions of the United Nations Charter have no bearing on the case before the Court." (R. 39.)

The "Treaty" argument is completely disposed of in the Annotations cited, and especially in 3 A. L. R. 2d 484. Petitioner cites no authority contrary to the statement of the Michigan court quoted with approval by the Iowa Court.

> "* * * these pronouncements (Art. 55, 56 United Nations Charter) are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples." (R. 39.)

3.

There is no Federal Public Policy Forbidding Racial Discrimination by Private Citizens of States.

The contention of the Petitioner that the action of the Supreme Court of Iowa violates the public policy of the United States appears to be based solely upon the language of the United States Supreme Court in the *Hurd* case (334 U. S. at 34-35; 92 L. Ed. 1195). It is to be remembered that the decision of this Court in the *Hurd* case rested upon the applicability of the Civil Rights Acts to citizens of the District of Columbia. After so deciding, the opinion states:

> "But even in absence of the statute there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States * * *."

In any event, whether the "public policy" argument was essential to the decision or not, Federal Public Pol-

icy cannot transcend the Constitution. Congress, many years ago, undertook in the Civil Rights Acts to express a public policy respecting rights of individuals within the States, and this Court in the Civil Rights cases held that action to be unconstitutional. If Congress is powerless to forbid private racial discrimination among citizens of the States, and is limited to the District of Columbia, as held in the Civil Rights cases and in the *Hurd* case, where then can any "Federal Public Policy" be found applicable to the facts in the case at bar?

"Public Policy" is not something that can be plucked from the air, and it cannot be declared because it seems right and desirable to the particular judge before whom the question comes. It is well to remember the language of an old English case (*Richardson v. Mellish*, 2 Bing 299):

> "I protest, as my Lord has done, against arguing too strongly on public policy; it is a very unruly horse, and once you get astride it, you will never know where it will carry. It may lead you from sound law. It is never urged at all, but when other points fail."

The Iowa Supreme Court has frequently defined "public policy." In the early case of *Richmond v. Dubuque & Sioux City Ry. Co.* (1868), 26 Ia. 191, the Iowa Court said:

> "But further than this, the power of Courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

We submit that the "Public Policy" of the United States applicable to the case at bar is correctly summarized as follows:

1. "Public Policy," as deduced from judicial decisions, is to allow the Citizens the greatest possible measure of liberty consistent with law.
2. Citizens of the States may discriminate between themselves on racial and religious grounds unless forbidden to do so by State statute or decisions.
3. Racial and religious discrimination may not be enforced by "State Action."
4. Citizens of the District of Columbia are forbidden to discriminate by the Civil Rights Acts.
5. In defining "Public Policy" judges determine what the law is; not what they consider it ought to be.

———o———

CONCLUSION

In conclusion, Respondent submits that the only question involved in this review of the opinion of the Iowa Supreme Court is whether there is anything in the Constitution, Laws, or Treaties of the United States which prevents racial discrimination in private contracts. If, as repeatedly stated by this Court, the Fourteenth Amendment "erects no shield against merely private conduct however discriminatory or wrongful" and "* * * restrictive agreements standing alone cannot be regarded as

violative of any rights guaranteed to petitioners * * *," then surely the parties in question had the undoubted right to enter into the contract here involved. It does not follow from the fact that the restrictive covenant cannot be enforced by an injunction in a State Court (*Shelley* and *McGee* cases), nor that a *breach* of the contract cannot be punished by damages (*Barrows*), that one of the parties who freely entered into the contract can recover damages from the other party because such other party refuses to perform a wholly different contract.

If Petitioner is allowed to prevail here, what will be the effect on the right of a private school to maintain racial or religious segregation? If sued by anyone either denied admittance because of such discrimination, or discharged from the institution because of the restriction after admittance had been gained by falsely representing he was of the required race or religious faith, must a State Court award injunction or damages because to allow any defense would constitute "State Action"?

The right to regulate the private conduct of, and to prescribe the rights, duties and obligations between, those within its borders has heretofore been left to each State. Respondent submits this is as it should be. If Petitioner is entitled to recover on the facts stated in her Petition, then this Court will have drastically extended its long established interpretation of the Fourteenth Amendment and will have sanctioned federal invasion of a field heretofore held to be exclusively reserved to the individual States.

Respectfully submitted,

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